EXCERPTS FROM THE

CALIFORNIA

Report on the Lawyer Regulation System

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Recommendation 2: Resource Allocation for and Structure of the Disciplinary Agency Should Ensure the Complete and Efficient Investigation and Prosecution of Complaints

Commentary

The Office of the Chief Trial Counsel and the State Bar Court continue to try to recover from the 1998 shutdown of the system. As noted generally in the Overview section of this Report, the total inventory of cases pending (inquiries, investigations and matters awaiting the drafting of charges and/or filing with the State Bar Court) upon staff's return in March 1999 was 8300 matters. Of that number, 2272 were backlogged investigations. Generally an investigation is considered statutorily backlogged if it is not completed in six months or twelve months if the matter has been designated as complex. Currently, the inventory of pending cases is 5122, with a statutory backlog of 1306 matters calculated in the manner described above.

The team was advised that as a result of the 1998 shutdown of the system, the Office of the Chief Trial Counsel lost approximately 700 years of collective experience due to layoffs. While some of those experienced counsel returned to the State Bar, the Office of the Chief Trial Counsel had to hire many new lawyers with little or no practice experience. As a result, the system has had to overcome a steep learning curve. The Interim Chief Trial Counsel and his entire staff deserve immense praise for winnowing the existing inventory to its current state and resurrecting the system. There is, however, still much work to be done to recreate an effective, even proactive, lawyer regulatory system.

The disciplinary agency should continue its efforts to prioritize the handling of cases in the system in order to eliminate current backlogs within a reasonable period of time and to ensure the future fair, complete and efficient investigation and prosecution of cases. Currently, each investigator maintains a caseload of approximately 30-40 matters. The lawyers in the General Trial Unit have caseloads of approximately 40-50 cases. In order to plan for appropriate caseload levels once the system is current, the experience of the lawyer and investigator, the nature of their duties and the complexity of cases must be considered. For example, lawyers in the General Trial Unit may be able to handle more cases than those in the Specialty Prosecutions Unit because of the complexity and voluminous nature of the matters that the latter department handles. As recent law school graduates and new investigators gain more experience, their caseloads can increase. The Chief Trial Counsel should take these factors into consideration when recommending workload and staffing standards for the agency.

The team is aware of the 2001 workload study. Any new workload standards developed for the system should include time guidelines for the processing of cases. Investigation and the filing and service of notices of disciplinary charges or other dispositions of routine matters generally should be completed within six months. Complicated matters should be completed within twelve months. This conforms to existing guidelines in use for determining when a matter is to be backlogged. The period of time from the filing and service of notices of disciplinary charges to the filing of the State Bar Court judges' opinions should generally not exceed six months, but may be longer in complex matters. The period for appellate review should also generally not exceed six months. MRLDE 11 and Comment.

The Intake Unit's toll free number should be staffed full time. Currently, it is only staffed for four hours every day. Adequate resources should be provided to staff the toll free line with trained complaint analysts and/or lawyers. The Intake Unit is the gateway to the system, and it must be able to complete its high volume initial screening and resolution of complaints completely and expeditiously with as much personal attention as possible. Lawyers and complaint analysts in the Intake Unit should be provided with standards and priorities for the referral of matters to diversion programs, so that they can promptly and appropriately resolve matters. Their decisions affect the caseload for the entire system. Intake staff should notify complainants of the manner in which their complaints have been resolved. Additionally, complaint analysts, who spend much of their time on the telephone, should be provided with additional training in mediation and dispute resolution techniques.

The agency should also ensure that appropriate cases involving lesser misconduct are addressed through the diversion and alternatives to discipline program. Currently, the alternatives to discipline programs operate within the Office of the Chief Trial Counsel. They include the ethics school, trust accounting school, law office management assistance, mandatory continuing legal education in ethics and substance abuse programs. Agreements in lieu of discipline are used to refer lawyers to the program before and after the filing of a notice of disciplinary charges. There is a statutory mandate for the State Bar to create and implement these programs. As discussed in more detail in Recommendation 17 below, it is preferable for the State Bar to bring its resources and expertise to the operation of the alternatives to discipline program, as noted in the McKay Report. Members of the State Bar indicated a willingness to develop new programs and enhance existing ones to help lawyers and the public. Prompt referral of appropriate cases to a diversion/alternatives to discipline program operated by the State Bar rather than one operated by the Office of the Chief Trial Counsel permits the disciplinary agency to devote its resources to the prompt investigation and prosecution of serious cases.

In Los Angeles, the Office of the Chief Trial Counsel is structured on a horizontal model with the exception of the Specialty Prosecutions Unit. This means that investigations are conducted by staff in the General Investigations Unit after referral from the Intake Unit; the General Trials Unit prosecutes cases before the State Bar Court. According to information provided during interviews, investigators in the General Investigation Unit act independently, although they are supervised by lawyers. After a decision is made to file formal disciplinary charges, the case is transferred to the General Trials Unit. There, a new lawyer, with paralegal support, undertakes responsibility for the prosecution of the matter. There are no investigators in the General Trials Unit. In contrast, the Specialty Prosecutions Unit is structured vertically to investigate and prosecute cases. The

investigators and lawyers in that Unit work together closely and are involved in the case from commencement to conclusion.

The consultation team was told that the managers in the Office of the Chief Trial Counsel decided that the use of a horizontal structure was necessary to address the volume of pending matters and to engender teamwork and trust among the staff. The consultation team was told that the goal is to file matters before the State Bar Court as quickly as possible and to use liberal amendment rules and discovery to fine tune if needed. However, the team was advised by various sources that the horizontal system does not, as planned, foster as effective an atmosphere of teamwork as the vertical system used by the Specialty Prosecutions Unit. The team was also informed of instances where the lawyers in the General Trials Unit had to spend time conducting additional investigation after the filing of a Notice of Disciplinary Charges. To do so, they had to utilize the investigators in the General Investigations Unit. In some instances they had to alter the theory of the case or amend pleadings as a result of the additional investigation. While the team understands the volume driven nature of the work of the disciplinary agency, the team thinks that discovery and pleading rules should not be used as a substitute for complete and thorough investigations.

The vertical prosecution model used by the Specialty Prosecution Unit seems to be working well. It has resulted in greater efficiency and more comprehensive case preparation, as well as increased staff morale. The need for lawyers in the General Trials Unit to conduct additional investigation or rework the theory of the case wastes time and creates a perception of unfairness by complainants and respondents. Lawyers assigned to investigate cases should also be responsible for the trial of those matters. Investigators assigned to assist these lawyers should work together closely with the lawyers supervising the investigative plan for the case. With appropriate staffing levels, as evidenced by the Specialty Prosecutions Unit, the vertical model of case processing can result in greater consistency and the timely disposition of matters. The team suggests that, once the backlog is eliminated and the staff gains more experience, the Chief Trial Counsel consider expanding this verticalization of prosecutions. He/she may do so by creating an additional specialized unit from existing staff to investigate and prosecute cases of minor misconduct that are not appropriate for referral to the alternatives to discipline program.

The probation monitoring program should also be adequately funded and staffed. The team was advised that lawyers in the Intake Unit are currently charged with supervising lawyers who have been placed on disciplinary probation. Sufficient resources are necessary for probation to be successful as a sanction and for monitoring to determine if it should be revoked.

Recommendation 3: All Staff and Volunteers of the Lawyer Discipline System Should Continue to Receive Appropriate Training

Commentary

Everyone involved in the lawyer disciplinary system should receive appropriate and continuous training. This is particularly important given the number of new staff hired since the shutdown in 1998. The Office of the Chief Trial Counsel already has a well developed training program to educate new and existing employees about the nature and operation of the system, the State Bar Act and the Rules of Procedure of the State Bar of California, the workings of the State Bar Court and applicable case law. New staff members are required to attend the ethics school. The system's appellate lawyers conduct monthly sessions regarding the evidentiary rules, and they circulate a newsletter containing recent decisions in the area of disciplinary and professional responsibility law. Detailed training outlines exist as well.

There are, however, areas related to training that the consultation team believes could be improved. For example, the complaint analysts in the Intake Unit should receive more formalized training. The team was advised that telephone training for the complaint analysts, who are not lawyers, consists mostly of their listening to more experienced analysts field inquiries. After approximately two weeks of listening, the new complaint analysts begin taking calls with the oversight of a supervisor. They receive some mediation training and are required to attend the ethics school.

Those interviewed agreed that enhanced service is needed at the intake level because this is the first, and likely only, contact the public may have with the discipline system. As a result, training for complaint analysts should include formal mediation training and courses in public relations. Since the complaint analysts also conduct minimal investigation into complaints, they should be trained how to elicit necessary information from complainants, respondents and other witnesses. The complaint analysts should also be trained to expeditiously recognize matters that should be referred to the alternatives to discipline program.

The team also received information that indicated that training for lawyers who are new to the system should be expanded. For example, new lawyers should be trained about their role in the system and how to comport themselves with opposing counsel, in addition to receiving training about the rules and procedures. Since many of the new lawyers hired by the agency after the 1998 shutdown are recent graduates with little law firm experience, training should include time spent with private practitioners, including respondents' counsel, to familiarize them with the operation and demands of private practice. It may be helpful to require all staff lawyers to enroll in courses offered by organizations like the National Institute of Trial Advocacy (NITA). They should include courses in settlement negotiations and deposition practice, in addition to courses in trial practice.

Investigators should receive additional training designed to enhance their abilities to conduct thorough, yet expeditious inquiries. This may include courses offered by law enforcement agencies, or courses designed to enhance their use of technology in the gathering of information.

Recommendation 4: Appropriate Resources Should Be Devoted to Enhance Public Access and Confidence in the California Lawyer Discipline System

Commentary

The State Bar of California and the Office of the Chief Trial Counsel produce pamphlets and other publications about the disciplinary system and related services offered by those entities. The State Bar's Website and the Intake Unit's telephone tree provide an abundance of information about the disciplinary process and other State Bar programs. The State Bar's Website also allows members and the public to access disciplinary information relating to California lawyers. California was one of the first states in the nation to make this type of information available on the internet. The content on the State Bar's Website is excellent, and the site is very user friendly. The State Bar updates the information regularly. The team believes that the disciplinary agency and/or the State Bar should increase efforts to publicize the availability of disciplinary and other information about the discipline system on the State Bar's Website.

Given the impact of the shut down on the disciplinary system, it is particularly important that the public and the bar have current information about the state of the system and the level at which its current programs are operating. The team received information which indicated that, due to frequent changes to the disciplinary procedural rules and in the implementation of the priorities for handling cases, many lawyers do not understand how the system currently operates, or where to find all of the applicable procedural and conduct rules (See Recommendation 16 below). As a result, the consultation team believes that the Office of the Chief Trial Counsel and the State Bar should increase their efforts to better educate the public and the bar about the disciplinary process. This would include the publication and dissemination of additional brochures and pamphlets about the system in locations frequented by the public, such as courthouses, public libraries and other governmental offices. The disciplinary agency should resume its regular meetings with the respondent's bar, and representatives from the Office of the Chief Trial Counsel should speak to local bar associations about the process. The system's adjudicators should hold bench/bar conferences to talk about matters of general importance such as how the tribunal operates, what is expected of lawyers who appear there and what can be done to make the system more efficient.

Lawyers associated with the Office of the Chief Trial Counsel and the regulatory court judges should also speak to the public and law students about the lawyer disciplinary system. In other states, lawyers and supreme court justices attend meetings of organizations such as the League of Women Voters and Rotary Clubs to speak about the discipline system and the justice system as a whole. Other jurisdictions have produced video tapes that are available for public viewing at libraries and at law schools.

Another important way to educate the public about the system relates to the information contained in letters explaining to complainants why the agency dismissed their

complaints. Section 6093.5 of the Business & Professions Code, requires the agency, upon request, to notify complainants of the status of their case and to provide them with a written summary of the respondent's response if that correspondence was the reason the complaint was dismissed. Section 6093.5 further states that a "complainant shall be notified in writing of the disposition of his or her complaint, and of the reasons for the disposition." The team was advised of and noted during a review of files, instances where complainants had not been notified in writing of the disposition of their grievances or the reasons for the disposition. The Office of the Chief Trial Counsel should always provide complainants with notice that their complaints have been dismissed. That notice should include an explanation of the reasons for the dismissal and the manner in which complainants can request reconsideration of the dismissal.

Additionally, the agency should consider providing complainants with copies of the respondent' s response to the grievance **prior** to the dismissal of the matter. Providing them with a summary of the response after the case has been dismissed deprives complainants of an opportunity to fully respond to the lawyer. Further, while having that information summarized by the disciplinary office may be more cost effective, complainants may be able to respond more completely and effectively if provided with the actual document(s) submitted by the respondent.

PROCEDURES

Recommendation 5: The Rules Relating to Resignations With Charges Pending Should Be Repealed

Commentary

Rule 960 of the California Rules of Court provides that a member of the State Bar who is subject to disciplinary charges may submit a written resignation from State Bar membership and the right to practice law. Upon the filing of the resignation, a lawyer agrees to be placed immediately on inactive status. The contents of the resignation must note that there are charges pending against the lawyer and include a statement that, if the resignation is accepted by the Court and the lawyer applies for reinstatement, the State Bar can consider all disciplinary matters pending at the time of the resignation. The resignation also includes a statement by the lawyer that he or she will comply with the rules relating to the duties of disbarred, resigned or suspended attorneys.

Lawyers who resign from the practice of law with charges pending are not required to make any form of admission of culpability to the pending charges. The disciplinary agency receives a copy of the resignation and submits a recommendation to the Court as to whether it should accept the resignation. The Office of the Chief Trial Counsel may, pursuant to Rule 651 of the Rules of Procedure of the State Bar of California, perpetuate testimony or documentary evidence relating to the conduct of the lawyer if that evidence is relevant to any future inquiries into the lawyer's conduct. The lawyer who submits the resignation may not perpetuate testimony except upon order of the Court for good cause shown. Rule 653 (b), Rules of Procedure of the State Bar of California.

The rules relating to resignations with charges pending should be repealed. Respondents should not be able to resign their law license as a result of pending investigations or charges without an admission of culpability or the imposition of a disciplinary sanction. Where a lawyer agrees to withdraw from the practice of law, his/her action should be treated as consensual disbarment, not resignation. This has been ABA policy since 1970 and is consistent with national practice. As noted in the Standard 11.1 of the 1979 ABA *Standards for Lawyer Discipline and Disability Proceedings* and its Comment:

> **1.1 Admission of Charges Required. A respondent should not be able to consent to being disciplined while a disciplinary proceeding is pending against him unless he admits in writing the truth of the charges that are the subject of the proceeding.**
>
> The respondent should be required to admit the charges before discipline is stipulated, so that evidence of guilt will be available if he later claims that he was not, in fact, guilty. Petitions for reinstatement are often filed years after discipline has been imposed, and if there is no admission it may be difficult for the agency

to establish the misconduct because relevant evidence and witnesses may no longer be available.

Rules 133 and 135 of the Rules of Procedure of the State Bar of California provide for stipulated dispositions of matters by the parties. These Rules provide the necessary safeguards for the public that Rule 960 of the California Rules of Court does not—an admission by the respondent that the facts and/or conclusions of law relating to the alleged misconduct are true. Stipulated dispositions allow for the entire range of sanctions to be imposed pursuant to an agreement between the parties, subject to approval by the State Bar Court and, in cases of suspension or disbarment, by the Supreme Court of California. The team believes that lawyers who agree to discipline on consent pursuant to the stipulation rules should be required to verify or execute an affidavit acknowledging that the facts alleged are true and that they are entering into the agreement voluntarily with full knowledge of the consequences. Currently they are only required to provide an unverified general statement to this effect and the case must be redeveloped during a reinstatement proceeding, long after the misconduct has taken place. The affidavit containing the admission should be used during the reinstatement/readmission process. MRLDE 21 and comment. Additionally, the lawyer should be required to notify his/her clients, opposing counsel and the courts of the agreed discipline imposed, consistent with the requirements of Rule 955 of the California Rules of Court. As noted above, lawyers who are now able to resign with charges pending are required to comply with Rule 955.

Recommendation 6: The Default Process Should Be Clarified and Streamlined

Commentary

The team was advised that currently, default occurs in approximately 35-40% of the cases in which lawyers are charged with misconduct. Section 6007 (e) of the Business and Professions Code sets forth general conditions under which a lawyer can be placed on involuntary inactive enrollment due to default. Specifically, there must be proper service of the Notice of Disciplinary Charges pursuant to Section 6002.1 of the Code, and the beginning of the Notice must contain specific language regarding when a default will be entered, in all capital letters. Section 6007 (e) (3) further states that placing a defaulting lawyer on involuntary inactive enrollment is administrative in nature and that no hearing is required.

Rules 101 and 200 – 210 of The Rules of Procedure for the State Bar Court expand upon the requirements of Section 6007, and set forth a lengthy and at times seemingly conflicting default procedure. For example, Rule 101 provides the language regarding default that must appear in all capital letters at or near the beginning of the Notice of Disciplinary Charges. Specifically, it says that:

> "IF YOU FAIL TO FILE AN ANSWER TO THIS NOTICE WITHIN THE TIME ALLOWED BY STATE BAR RULES, INLCUDING EXTENSIONS, OR IF YOU FAIL TO APPEAR AT THE STATE BAR COURT TRIAL, (1) YOUR DEFAULT **SHALL** (emphasis added) BE ENTERED, (2) YOU SHALL BE ENROLLED AS AN INACTIVE MEMBER OF THE STATE BAR…"

The use of the word "shall" in the default warning indicates that the entry of default is automatic if the conditions are met. However, Rule 103 (d), which relates to responses to Notices of Disciplinary Charges, provides that the Deputy Trial Counsel **may** elect to proceed by default if an answer is not timely filed. This would seem to indicate that the entry of default is not automatic. The rules should be consistent. The team suggests that the language in the Notice be amended to substitute the word "may" for "shall", or that Rule 103 be amended to require the Deputy Trial Counsel to file a motion for default and to deem the allegations of the Notice admitted.

Rule 200 of the Rules of Procedure of the State Bar of California is entitled "Default Procedure for Failure to Timely File Response." The Rule sets forth the information that must be included in the Deputy Trial Counsel's motion for entry of an order of default. That motion must include language in prominent type informing the respondent that he or she has ten days from the time of service of the motion to respond to it. If no response is received, the Rule provides that the default will be entered, the factual allegations will be deemed admitted, otherwise inadmissible evidence can be used against the respondent, and the respondent will lose the opportunity to further participate in the proceedings.

If a respondent does not reply to the motion for default, the Clerk of the State Bar Court enters and serves on the respondent a Notice of Entry of Default. The respondent may timely move to vacate the default. Unless the default is vacated, Rule 200 (d) (1) provides that no further proof is required to establish the truth of the allegations in the Notice of Disciplinary Charges.

Rule 202 provides that, after the entry of an order of default, an expedited hearing shall be held at which the Deputy Trial Counsel may introduce "…any evidence on which responsible persons are accustomed to rely in the conduct of serious affairs…." The testimony of witnesses may be taken. Evidence at this hearing is not limited to that relating to factors in aggravation and/or mitigation. The Deputy Trial Counsel may submit written evidence with a request for waiver of hearing. It was not clear to the team how often this happens.

The team recommends that any hearings in default cases be limited to evidence of aggravation and mitigation, or that any additional documentary evidence be filed with the State Bar Court. The time spent taking additional evidence when the allegations of the complaint have been admitted, except in the most extreme circumstances, would seem unnecessary. State Bar Court judges issue full, written opinions in each default case. The team was advised that the Supreme Court wants opinions in default cases; however these opinions could be more concise.

Lawyers who default should be placed on involuntary inactive enrollment status within a short period of time after they fail to file an answer to the Notice of Disciplinary Charges. The team was also advised that in many instances these lawyers receive low level discipline at the conclusion of the default proceedings. Lawyers who do not participate in the proceedings and who are found to be in default should ultimately be suspended and required to petition for reinstatement. A default process resulting in low level discipline routinely results in recidivism and causes an unnecessary waste of resources. The team was advised of instances where staff lawyers had to bring additional charges against lawyers who had previously defaulted.

Recommendation 7: The Decision Whether to Disclose Otherwise Confidential Information In Designated Circumstances Should Rest Solely With the Office of the Chief Trial Counsel

Commentary

Consistent with national practice, disciplinary proceedings in California are confidential until the filing of formal charges. However, Section 6086.1 of the Business and Professions Code provides that the Chief Trial Counsel or the President of the State Bar may waive confidentiality when warranted for the protection of the public. Rule 2302 of the Rules of Procedure of the State Bar of California provides examples of specific instances where such disclosure may occur. Disclosure is not limited to those instances.

While the team agrees with the rationale for waiver of confidentiality to protect the public, it believes that only the Chief Trial Counsel should have that power under specified circumstances. MRLDE 16 (B) and Comment. The Rule and State Bar Act should be amended accordingly to allow only the Chief Trial Counsel to disclose the pendancy, subject matter and status of an investigation under these circumstances.

The election to the office of President of the State Bar is, by its nature, political. Each person to hold the office has a different personality, comes from a different background and has different goals for the State Bar and the discipline system. Placing this power with the President of the State Bar creates an unnecessary risk that the public and respondents will perceive any disclosure by the President as politically motivated. The President of the State Bar should not be involved in or provided with details about the specifics of confidential investigations. To do so creates the appearance of conflicts of interest or impropriety. While the team was presented with no evidence that any State Bar President has abused this power, it feels that the risk of such interference and consequent damage to public perception of the system as independent and fair is reason enough to modify the rules.

The Chief Trial Counsel, as the head of the disciplinary agency is the appropriate person in whom to vest with this power. He or she is specifically empowered to investigate and prosecute allegations of misconduct and has the expertise in the area of disciplinary law to impartially assess all the information necessary to make that decision. Under the system proposed in Recommendation One above, the Court would appoint the Chief Trial Counsel or its new oversight entity would make the choice with Court approval. This process would further ensure the independence of the individual who determines whether to waive the confidentiality rules in order to protect the public.

Recommendation 8: The Use of Early Neutral Evaluation Conferences to Expedite the Resolution of Matters Should Continue With Some Modifications

Commentary

If after investigation, a Deputy Trial Counsel determines there is sufficient evidence to proceed with a Notice of Disciplinary Charges, the Deputy Trial Counsel also conducts prefiling settlement discussions. At this point in the process, either party may request an Early Neutral Evaluation Conference (ENEC). Pursuant to Rule 75 of the Rules of Procedure of the State Bar of California, a State Bar Court judge conducts the ENEC if the parties are unable to reach an agreed disposition prior to the filing of a Notice of Disciplinary Charges. The State Bar Court judge is to hold the ENEC within 15 days of either party's request. The team was advised that it takes longer to schedule and hold the ENEC. Once an ENEC is requested, steps should be taken to ensure its prompt scheduling.

The ENEC judge provides the parties with a neutral evaluation of the merits of the case and the likelihood that discipline will be imposed if the matter proceeds to trial. The Deputy Trial Counsel provides the ENEC judge with a draft of the Notice of Disciplinary Charges along with any other evidence supporting the allegations. The respondent may provide documents to the ENEC judge as well. Both sides may designate documents as confidential to be examined by the ENEC judge *in camer*a. If the matter can be resolved as a result of an ENEC, the Deputy Trial Counsel is required to document the resolution and the ENEC judge may approve or reject the proposed agreement. Additional ENECs may be ordered by the judge. A judge who participates in an ENEC cannot act as the trial judge in the same matter.

All of those interviewed spoke highly of the ENECs. The team agrees that they are useful and assist in expediting the resolution of matters. They should be continued, but steps should be taken to ensure that the ENECs are not used to delay the processing of cases. Neither party, the General Investigation Unit in particular, should use the ENECs to conduct additional investigation. Respondents should not be able to withhold information from the agency until the initial ENEC. The use of the ENECs for this purpose creates delay, because in fairness to all involved, the judge will likely grant time for the parties to consider the newly gained information and schedule a new ENEC. The team was advised that this does happen. The team was also told that in a notable number of cases the ENEC constitutes the first opportunity for disciplinary counsel to obtain information from a respondent. This should not be the case.

The General Investigation Unit has the ability to subpoena witnesses to provide testimony during the course of the investigation. Bus. & Prof. Code, Sec. 6049, Rules of Procedure of the State Bar of California, Rule 2502. Those who do not comply with the subpoenas are subject to contempt proceedings. Bus. & Prof. Code, Sec. 6050. Information provided to the consultation team indicated that in the Los Angeles office there are a number of cases where the respondent has not provided information to the investigators

in response to inquiries. Despite the nonresponse, the use of investigative subpoenas to elicit a response is minimal. Deputy Trial Counsel in the General Investigation Unit should exercise the subpoena power to compel recalcitrant respondents to provide information. Respondents have a duty to cooperate with the disciplinary agency, and they should be held to that duty. Further, the General Investigations Unit should proactively investigate its cases. Disciplinary counsel should continue to provide respondents with all unprivileged information in the file.

Recommendation 9: Rules 182 and 211 of The Rules of the State Bar of California Should Be Merged

Commentary

Rule 182 of the Rules of Procedure for the State Bar of California states that within twenty days after a respondent files a responsive pleading in a matter where discovery can proceed without court order, the parties must have a discovery conference. At this discovery conference, where a State Bar Court judge is not present and no orders setting the parameters of discovery are issued, the parties are to attempt to reach agreement on the terms for informal discovery. This includes the exchange of documents and information about witnesses. The parties are also supposed to create a plan and timetable for the completion of formal discovery. The parties can stipulate, without leave of court, to one continuance of this conference, not to exceed thirty days from the date of service of the responsive pleading.

Rule 211 provides for the filing of pretrial statements and the conducting of pretrial conferences. That Rule states that pretrial conferences shall not be held more than 45 days before the trial date. At the pretrial conference, the judge rules on objections to the pretrial statements and may order the amendment of those statements.

In order to further streamline the disciplinary process, pretrial conferences should be regularly utilized to promote the timely disposition of cases. MRLDE 18(E). As a result, the team recommends that the requirements of Rules 182 and 211 be merged and expanded. Effective case management is vital to the fair and expeditious disposition of cases. A requirement that all pre-hearing conferences must be held before a judge should reduce actual delay, or the risk of delay by the parties. These formal pretrial conferences allow the parties and the judge to create a case management plan early in the process that is tailored to the unique nature and complexity of each case; less complex cases require less discovery and less time to prepare for trial. By recommending that all pretrial conferences must be held before a judge, the team does not intend to discourage the parties from communicating and cooperating with each other regarding discovery issues. They should continue to do so, and any agreements that they reach can be discussed and memorialized in the pretrial order issued at the pretrial conference.

The team recommends that the new Rule should provide that the initial pretrial conference is to be held within a short period of time (fifteen to twenty days) after the filing of an answer to a Notice of Disciplinary Charges. The team believes that waiting until 45 days before trial is too long. All pretrial conferences can occur in person or by telephone and should be recorded by some means. At the initial pretrial conference the judge should issue an order setting forth the terms of discovery, deadlines for the filing and resolution of pretrial motions and stipulations regarding facts, documents and other evidence. Subsequent pretrial conferences should be held as necessary to ensure the expeditious progress of a case through the system. The parties should not have to wait for the initial pretrial conference to file formal requests for discovery. Rule 182 currently

requires the parties to wait until 20 days after the date the answer to the Notice of Disciplinary Charges is due.

The following may occur during each pretrial conference: (1) formulation and simplification of issues; (2) elimination of frivolous charges and defenses; (3) amendments to pleadings; (4) stipulations relating to facts and the admissibility of documents to eliminate unnecessary proof; (5) pre-trial rulings on the admissibility of evidence; (6) identification and limitation of occurrence, character and expert witnesses, including explanations of the subject matter of their proposed testimony; (7) limitations on discovery, including the setting of deadlines and limitations on the number and length of depositions; (8) the possibility of discipline on consent; and (9) any other matters that will aid in the prompt disposition of a matter. Subsequent to each pretrial conference, the judge should enter an order setting forth all actions that he/she has taken and reciting any agreements between the parties.

The routine use of pretrial conferences also creates opportunities for judges to obtain copies of undisputed documentary evidence in advance of trial so that they can familiarize themselves with that evidence before the commencement of the trial. This too saves time.

Recommendation 10: Procedures to Place Lawyers on Involuntary Inactive Enrollment for Threat of Harm Should Be Streamlined

Commentary

Sections 6007 (c) (1) through (4) of the Business and Professions Code sets forth the requirements for determining when a lawyer can be placed on involuntary inactive enrollment when that lawyer poses a substantial threat of harm to the lawyer's clients or the public. In order to determine that a lawyer's conduct poses such a substantial threat of harm, the State Bar Court judge must find that **each** of the following factors has been demonstrated based upon all available evidence: (1) the lawyer has caused or is causing substantial harm to clients or the public; (2) the lawyer's clients or the public is likely to suffer more harm from the denial of the involuntary inactive enrollment than the lawyer will suffer if it is granted, or there is a reasonable likelihood that the harm will reoccur or continue (where there is a pattern of misconduct by the lawyer, the burden of proof shifts to the lawyer to show there is no reasonable likelihood that the harm will reoccur or continue); and (3) there is a reasonable probability the State Bar will prevail on the merits of an underlying disciplinary cased premised upon the misconduct. The statute further requires that these matters proceed on an expedited basis.

Rules 460 through 484 of the Rules of Procedure of the State Bar of California contain procedures to implement involuntary inactive enrollment proceedings pursuant to Section 6007 (c) (1) through (4). The Office of the Chief Trial Counsel initiates these proceedings by filing a verified application, with supporting documents, requesting that the lawyer in question be placed on involuntary inactive enrollment because he or she poses a substantial threat of harm to clients or the public. The application must set forth with specificity the facts relied upon by the Office of the Chief Trial Counsel in support of the request, along with the identification of any pending investigations or disciplinary proceedings that involve the same occurrences. The application should also set forth the specific rules and/or statutes alleged to have been violated if that information is not already contained in a Notice of Disciplinary Charges. The Office of the Chief Trial Counsel must serve the lawyer with a copy of the application within three days after filing. The Office of the Chief Trial Counsel may request a hearing on the application, or a State Bar Court judge may order one if he or she deems it appropriate. Based upon the language of Rule 461, it appears that the Clerk of the State Bar Court automatically sets a hearing on an expedited basis.

Pursuant to Rule 462 a lawyer against whom such an application has been filed must respond to that pleading within ten days from the date of service and request that the hearing scheduled by the Clerk be held. If no response and request for hearing is filed the lawyer is deemed to have waived his or her right to the hearing. The lawyer may stipulate to the involuntary inactive enrollment as well. Rule 463 provides that any such stipulation must contain the factual basis thereof. However, it appears to the team that the lawyer does not appear to be required to include an admission of misconduct.

If the matter proceeds to hearing, Rule 464 provides that the State Bar Court judge conduct it in an expedited manner, with no interruptions or continuances except for good cause shown. Rule 465 states that the evidence to be entered at the hearing shall be in the form of documents, declarations, requests for judicial notice and transcripts. Live testimony and cross-examination is not permitted unless the judge determines that good cause has been shown by the requesting party. If the hearing is contested the judge must rule on the admissibility of the offered declarations. If no hearing is held, Rule 465 (c) provides that any declarations offered must contain probative facts and show the source of the declarant's information. Declarations based upon information and belief are insufficient proof of substantial harm.

Rule 466 requires the judge to file his or her decision no later than ten days after the conclusion of the hearing, or no later than ten days after the date set for hearing if no hearing is ultimately held. The decision of the court is effective upon personal service or three days after service by mail. The court's order must include a statement as to whether the lawyer received notice of the proceedings and that each of the factors set forth in Section 6007 (c) (2) has been met. Review of the decision whether to place a lawyer on involuntary inactive enrollment for threat of substantial harm may be based only upon error of law or abuse of discretion.

Section 6007 (c) (1) through (4) of the Business and Professions Code, and Rules 460 et. seq., should be amended to expedite and simplify the process. Information received by the team demonstrates that the current procedures and requirements are not adequately protective of the public and provide excessive due process to the respondent. Certain misconduct, such as ongoing conversion of client funds, poses such a substantial threat of serious harm to the public and the administration of justice that the **immediate suspension** of a lawyer's license pending final resolution of disciplinary proceedings is warranted. Most states provide for immediate interim suspension in these circumstances.

Any amendments to the current rules and statute should provide that, upon receipt of sufficient evidence demonstrating that a lawyer has committed a violation of the Rules of Professional Conduct and poses a substantial threat of serious harm to the public, the Office of the Chief Trial Counsel should transmit that evidence to the regulatory court along with a proposed order for immediate involuntary inactive enrollment. MRLDE 20 and Comment. The Office of the Chief Trial Counsel should contemporaneously attempt to provide the respondent with notice of the filing. This notice may include notice by telephone. MRLDE 20 and Comment. Upon examination of this evidence and any rebuttal evidence submitted by the respondent prior to the ruling, the court should, if appropriate, enter an order immediately placing the lawyer on involuntary inactive enrollment. All hearings on applications to place a lawyer on involuntary inactive enrollment should be eliminated. They permit a lawyer engaging in conduct constituting a substantial threat of serious harm to clients and/or the public to continue to engage in misconduct, under the guise of a valid law license, pending the hearing and issuance of the court's order. This is not protective of the public, nor does it enhance the integrity of the profession. This rule applies to extreme cases and the interests of clients and the public requires only necessary due process to the lawyer. Additionally, the only evidence

to be introduced at these hearings is documentary. This information can be appended to the application for involuntary inactive enrollment.

The entry of such an order without a hearing does not deprive the lawyer of due process. This procedure is similar to those applicable to civil temporary restraining orders, except they do not expire automatically. Additionally, a lawyer should be able to file a motion for dissolution of the court's order upon two day's notice to the Office of the Chief Trial Counsel. Due process considerations require that a prompt post-suspension hearing on that motion be given to the lawyer.

The portion of the State Bar Act requiring the current State Bar Court to consider whether the lawyer's clients or the public are likely to suffer greater injury from the denial of the petition than the lawyer is likely to suffer if it is granted should be eliminated as well. The interests of clients and the public in cases like these are paramount to the potential harm to the lawyer engaging in such serious misconduct. The inclusion of this standard of proof in the existing rules creates a perception of protectionism that is damaging to the profession.

Recommendation 11: The Review Department of the State Bar Court Should Use a More Deferential Standard of Review

Commentary

Pursuant to Rule 951.5 of the California Rules of Court, the Review Department of the State Bar Court conducts a *de novo* review of the proceedings at the hearing level. The team recommends that the Supreme Court of California amend Rule 951.1 to provide for a more deferential standard of review. The Review Department of the State Bar Court should no longer consider appeals on a *de novo* basis. The team understands that the issue of amending the Rule to provide for a more deferential standard has been studied prior to the team's visit.

A more deferential standard of review should be adopted and used by the Court as well in its review of disciplinary matters. All information provided to the team indicates that the hearing judges conduct thorough, fair trials and write opinions with complete findings of fact, conclusions of law and recommendations for discipline. Given this, there seems to be no need for a *de novo* review by the appellate level, particularly with respect to findings of fact. The hearing judges are able to observe the witnesses' testimony and demeanor and are in the best position to assess their credibility. Unless there is evidence that their findings of fact are clearly erroneous, the factual determinations of the hearing judges should stand. With respect to conclusions of law and recommendations of discipline, unless the trial judges have acted arbitrarily, committed reversible error, incorrectly stated the law or abused their discretion, their findings should not be reversed. Further, given the completeness of the underlying findings, adopting a new, more deferential standard of review will not deprive the Supreme Court of a complete, full and fair disposition of the case for consideration.

Steps should also be taken to expedite the appeals process at that level. The team was advised that due to difficulties with court reporters, it can take up to six months to obtain a transcript. Information provided to the team also indicated that it can take as long as six months to schedule oral argument after the filing of briefs. The State Bar Court should ensure that the proceedings at the hearing level are transcribed promptly. Given the size of the caseload at the review level, it should not be difficult to eliminate the delay in scheduling oral arguments.

The Office of the Chief Trial Counsel should also handle disciplinary appeals before the California Supreme Court. Currently, the Office of the General Counsel of the State Bar handles those appeals. The staff of the Office of the Chief Trial Counsel has the expertise to handle these appeals. The team believes that lawyers from that Office, where the complaint has proceeded from investigation to prosecution, are in the best position to brief and argue a disciplinary matter before the Court. Further, allowing the Office of the Chief Trial Counsel to brief and argue these matters would eliminate any perception of conflict of interest or impropriety that might arise when the case is transferred out of the disciplinary agency to the State Bar.

Recommendation 12: Lawyers Petitioning For Reinstatement Should Be Responsible For the Costs of Those Proceedings

Commentary

Sections 6086.10 and 6140.7 of the Business and Professions Code together generally provide that the costs of disciplinary proceedings resulting in the imposition of discipline by the Court, including resignations with charges pending, shall be paid by the disciplined lawyer as a condition of reinstatement. The State Bar Act does not provide for the recoupment by the disciplinary agency of the costs associated with reinstatements. Currently, petitioners are required to pay a $900 reinstatement fee to the State Bar Court. None of those monies are received by the Office of the Chief Trial Counsel to offset the investigation and defense of petitions for reinstatement.

Nationwide, the investigation of petitions for reinstatement is extremely time and resource intensive. The number of lawyers who apply for and actually are granted reinstatement is low. In many instances where disbarment or suspension was on consent, or in California in cases of resignations with charges pending that do not contain admissions of the facts, disciplinary counsel must reinvestigate the underlying misconduct in addition to information relating to the petitioner's current fitness to practice law.

Disciplined lawyers must be required to pay the costs of the proceedings that led to their discipline. They bear the burden of proving in a reinstatement proceeding their fitness to practice law. As part of this burden they should be required to pay for the reasonable costs of reinstatement proceedings. This would include reimbursing the Office of the Chief Trial Counsel for reasonable costs associated with the investigation and defense of the petition for reinstatement. The $900 deposit now paid to the State Bar Court should be used for this purpose.

Recommendation 13: Section 6043.5 of the Business and Professions Code Should Be Repealed

Commentary

Section 6043.5 of the Business and Professions Code states that "[E]very person who reports to the State Bar or causes a complaint to be filed with the State Bar that an attorney has engaged in professional misconduct, knowing the report to be false and malicious is guilty of a misdemeanor." The State Bar may, in its discretion, report such complainants to the District Attorney's office with a recommendation for prosecution.

This statute should be repealed. Complainants should not be subject to the threat of criminal prosecution or civil liability for the filing of a complaint with the disciplinary agency. It is vital to the integrity of the disciplinary process that complainants be permitted to freely file their grievances. The individual lawyer may suffer some hardship as the result of the filing of a malicious complaint, but a profession that wants to preserve the power to police its own members must be willing to make some sacrifice. The damage to the public's perception of the profession by permitting the prosecution of complainants is far greater. The public must have confidence that the legal profession will not only consider, but actively seek out information about unethical lawyers and protect from threats those who provide that information.

The disciplinary process in California provides for confidentiality until the filing of a Notice of Disciplinary Charges. The investigation of allegations of misconduct is confidential. This provides a significant layer of protection for lawyers against false and malicious complaints becoming public. The professional staff of the Office of the Chief Trial Counsel provides additional protection. It is their job to screen the meritorious complaints from those that have no merit or are filed to harass a lawyer. As a result, it is highly unlikely that any false or malicious complaint will become public, and the most likely damage to the lawyer will be the inconvenience of having to respond to the complaint with the protection of confidentiality. In fact, lawyers who have complaints filed against them are provided greater protection from public disclosure than a party to an ordinary civil action.

Complainants should be provided with absolute immunity for any communications made to the disciplinary agency. MRLDE 12 and Comment. All but perhaps two or three jurisdictions confer either absolute or qualified immunity on complainants for their communications with the agency. For the lawyer disciplinary system to be effective, complainants must be free to report possible lawyer misconduct. Absolute immunity does not protect complainants who commit perjury or who make slanderous statements outside the disciplinary proceedings.

Recommendation 14: Complainants Should Be Kept Fully Apprised of the Status of Their Complaints and Should Be Provided a Mechanism For Reconsideration of the Dismissal of Their Grievances

Commentary

As noted in Recommendation 4 above, Section 6093.5 of the Business & Professions Code, requires the agency, upon request, to notify complainants of the status of their cases and to provide the complainant with a written summary of the respondent's response if that correspondence was the reason the complaint was dismissed. That Section further states that a "complainant shall be notified in writing of the disposition of his or her complaint, and of the reasons for the disposition." Written notice should also be provided to complainants where lawyers against whom they have complained receive private discipline.

Information gathered by the team showed that complainants were not always provided with this information. While the team understands that the difficulties of dealing with the increased inventory of pending cases may have resulted in the failure to do so in all instances, the Office of the Chief Trial Counsel should ensure that complainants are always provided with notice that their complaints have been dismissed. That notice should include an explanation of the reasons for the dismissal and the manner in which complainants can request reconsideration of the dismissal. Previously, the Discipline Audit Panel, formerly the Complainants' Grievance Panel, provided a mechanism for reviewing dismissals by the Office of the Chief Trial Counsel. Bus. & Prof. Code, Sec. 6086.11. Section 6086.11 and all corresponding Rules of Procedure for the State Bar of California were repealed in January 2000.

The team does not recommend reinstating the Discipline Audit Panel, along with the resources that would be needed for its operation. However, complainants should be able to request the Office of the Chief Trial Counsel to reconsider the dismissal of their grievances. The team believes that Rule 2603 of the Rules of Procedure of the State Bar of California offers an appropriate vehicle for creating such a mechanism. That Rule provides the Office of the Chief the Chief Trial Counsel with the authority to reopen an investigation upon the receipt of new material evidence, or if there is good cause to do so. The Rule could be amended to state that complainants who believe that their complaints were wrongly dismissed may ask the Chief Trial Counsel or a designated Assistant or Deputy Chief Trial Counsel, to reconsider that decision. If the complainant provides additional material evidence in support of their complaint, or the reviewing lawyer deems it appropriate, the investigation can be reopened. If the Office of the Chief Trial Counsel denies the complainant's request for reconsideration, then the matter should proceed no further and the complainant should be so advised.

In addition to providing a detailed explanation of the dismissal, closure letters sent to complainants should include direction for requesting reconsideration of that decision and

note the circumstances under which such a request can be granted. In many instances complainants request reconsideration of their grievances because they are not told or do not understand why their complaint was dismissed. The inclusion of this information should result in a decrease in the number of complainants requesting reconsideration of dismissed complaints.

Recommendation 15: The Use of the Vague Term "Moral Turpitude" Should Be Eliminated From the Statutes and Rules Relating to Lawyer Conduct and Discipline

Commentary

Throughout the State Bar Act and the Rules of Procedure of the State Bar of California, reference is made to conduct involving moral turpitude. For example, Sections 6068(5), 6101 and 6102 of the Business and Professions Code refer to disciplinary procedures for lawyers convicted of crimes of moral turpitude. Rules 600 through 608 of the Rules of Procedure of the State Bar of California relate to Sections 6101 and 6012. Section 6106 of the Business and Professions Code provides that the commission by a lawyer of any act involving moral turpitude, dishonesty or corruption, regardless of the context in which the act is committed, is cause for disbarment or suspension. The *Standards for Attorney Sanctions for Professional Misconduct* also refer to misconduct involving moral turpitude.

The use of the term "moral turpitude" should be eliminated from the statutes and rules relating to lawyer conduct and discipline. As stated in the Comment to Rule 8.4 of the ABA Model Rules of Professional Conduct,

> [1] Many kinds of illegal conduct reflect adversely on fitness to practice law, such as offenses involving fraud and the offense of willful failure to file an income tax return. However, some kinds of offense carry no such implication. Traditionally, the distinction was drawn in terms of offenses involving "moral turpitude." That concept can be construed to include offenses concerning some matters of personal morality, such as adultery and comparable offenses, that have no specific connection to fitness for the practice of law. Although a lawyer is personally answerable to the entire criminal law, a lawyer should be professionally answerable only for offenses that indicate lack of those characteristics relevant to law practice. Offenses involving violence, dishonesty, breach of trust, or serious interference with the administration of justice are in that category. A pattern of repeated offenses, even ones of minor significance when considered separately, can indicate indifference to legal obligation.

The term "moral turpitude" was not included in the ABA *Model Rules of Professional Conduct* when they were adopted by the ABA House of Delegates in 1983. The term had been included in the predecessor ABA *Model Code of Professional Conduc*t. While not considered unconstitutionally vague, the range of conduct that might fall under the definition of the term "moral turpitude" is subjective. The ABA Model Rules of Professional Conduct reject the concept of "moral turpitude." The vast array of acts that may fall under that rubric do not necessarily relate to a lawyer's fitness to practice law. Instead, the Rules focus on criminal acts that reflect adversely on a lawyer's "…honesty, trustworthiness or fitness as a lawyer in other respects." ABA Model Rules of Professional Conduct, Rule 8.4 (b).

The ABA Model Rules for Lawyer Disciplinary Enforcement relating to convictions also omit mention of crimes involving moral turpitude, instead referring to "serious crimes." MRLDE 19 and Terminology. A serious crime is "any felony or any lesser crime that reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects, or any crime a necessary element of which, as determined by the statutory or common law definition of the crime, involves interference with the administration of justice, false swearing, misrepresentation, fraud, deceit, bribery, extortion, misappropriation, theft, or an attempt, conspiracy or solicitation of another to commit a "serious crime." MRLDE 19. The team recommends that relevant sections of the State Bar Act and the Rules of Procedure of the State Bar of California be amended to eliminate the term "moral turpitude" and replace it with the term "serious crime" as defined above.

The team also suggests that the Rules and Statutes be amended to provide for the immediate interim suspension of a lawyer **found guilty** but not yet convicted of a serious crime. Under Section 6102, the Supreme Court of California currently issues such a suspension upon conviction of a felony or crime involving moral turpitude. Continued practice by a lawyer found guilty of a "serious crime" undermines public confidence in the profession and the administration of justice. Because there may be delay between a determination of guilt and the entry of a judgment of conviction, the Court should enter an order of interim suspension upon the finding of guilt. It is difficult for the public to understand why a lawyer found guilty of stealing funds from a client can continue to handle client funds, why a lawyer found guilty of securities fraud can continue to prepare and certify registration statements, or why a lawyer found guilty of conspiracy to suborn perjury can continue to try cases and present witnesses. Immediate suspension of a lawyer found guilty of such a crime, regardless of the pendency of any appeal, is essential to preserve public confidence. The Court should continue to use convictions as the basis for summary disbarment.

Recommendation 16: The Rules Governing Lawyer Conduct and Disciplinary Proceedings Should Be Compiled In a More User Friendly Manner

Commentary

The Supreme Court should appoint a task force to revise and compile in one comprehensive and comprehensible document all of the Rules of Professional Conduct. Currently, the conduct rules are interspersed in the Rules of Professional Conduct, the State Bar Act and related statutes. Requiring California lawyers to search various locations for the relevant rules governing their conduct is confusing and constitutes a disservice to the bar. Additionally, having the conduct rules located in one document will help ensure consistency and eliminate the danger of conflicting rules and statutes. This document should be published together with the procedural rules that relate to the discipline system. Superseded rules or statutes should be published, if at all, after the current rule instead of before it. Given the volume of conduct rules in California, the team recommends that superseded rules not be published with the current rules.

ALTERNATIVE PROGRAMS

Recommendation 17: The Existing Alternatives to Discipline Program Should Be Enhanced and Moved to the State and Local Bars

Commentary

In California, as in the rest of the country, the majority of complaints made against lawyers allege instances of lesser misconduct. Single instances of minor neglect or minor incompetence, while technically violations of the rules of professional conduct, are seldom treated as such. These cases rarely justify the resources needed to conduct formal disciplinary proceedings, nor do they justify the imposition of a disciplinary sanction. These types of complaints are almost always dismissed by the disciplinary agency. Summary dismissal of these complaints is one of the chief sources of public dissatisfaction with disciplinary systems. The agency should ensure that appropriate cases involving lesser misconduct are addressed through the diversion and alternatives to discipline program.

Section 6086.14 of the Business and Professions Code authorizes the State Bar to establish such a program to resolve complaints against lawyers that do not warrant investigation or prosecution. Rules 4401 through 4407 of the Rules of Procedure of the State Bar of California set forth procedures for referral to the program. The Office of the Chief Trial Counsel has developed internal procedures and guidelines for the program. The team was also provided with a draft of a proposed statute relating to the establishment of a diversion program for lawyers suffering from substance abuse and/or mental health problems.

Currently, the alternatives to discipline programs operate within the State Bar and the Office of the Chief Trial Counsel. They include the ethics school, trust accounting school, law office management assistance, mandatory continuing legal education in ethics and substance abuse programs. Some local bar associations conduct mediation of lawyer-client disputes. Agreements in lieu of discipline are used to refer lawyers to such programs before and after the filing of notices of disciplinary charges.

The disciplinary agency should devote its resources to the investigation and prosecution of disciplinary complaints and continue working toward successful reduction of the post-shut down inventory of pending cases. While it should refer cases to the alternatives to discipline program and receive reports regarding the compliance of lawyers with the terms of agreements to enter these programs, the agency should be removed from the operation of most of those initiatives. The team believes that the State Bar and local bar associations should bring their resources and expertise to the operation of alternatives to discipline programs, as recommended in the McKay Report. This type of involvement in the regulatory process by the organized bar reflects positively on the profession. By

assisting lawyers whose conduct and/or practices are questionable but not worthy of formal prosecution, the bar helps lawyers and the public.

The alternatives to discipline program should be enhanced to include a sufficient variety of programs to address the specific areas of need demonstrated by lawyers referred from the disciplinary agency. The Office of the Trial Counsel may wish to continue to operate the ethics school and should explore new and creative ways to conduct the program. For example, members of the respondents' bar, State Bar Court judges and ethicists should be invited to teach portions of the class. The Office may wish to recruit previously disciplined lawyers to talk to participants. The Office might explore utilizing a program similar to National Institute of Trial Advocacy to educate participants about they ways to correctly handle situations that implicate the Rules of Professional Conduct.

SANCTIONS

Recommendation 18: The Issuance of Private Reprovals After the Filing of Formal Charges and Admonitions Should Be Eliminated

Commentary

Pursuant to Rule 270 of the Rules and Procedures of the State Bar of California, the State Bar Court may issued a private or public reproval after the initiation of proceedings before that tribunal. A private reproval issued at this time becomes part of the lawyer's disciplinary record, is disclosed in response to public inquiries and reported as a record of public discipline on the State Bar's web site. A private reproval issued before the commencement of State Bar Court proceedings is not disclosed in response to public inquiries and does not appear on the State Bar's web site. The records of proceedings in which the private reproval was issued in these cases are not available to the public.

The team recommends that the imposition of private reproval **after** the filing of a Notice of Disciplinary Charges or initiation of other State Bar Court proceedings should be eliminated. There should not be private discipline after the filing of public charges. The imposition of a private sanction after the filing of public charges adversely impacts the public's perception of the disciplinary process. MRLDE 10 and Comment. The existence of a private sanction that can be issued subsequent to any proceeding on formal charges fosters distrust of the system. Additionally, based upon the language of Rule 270, private reprovals of this type are not really private. As a result, it makes no sense to maintain that they are.

The team also recommends that admonitions be eliminated. Rule 264 of the Rules of Procedure of the State Bar of California provides for the issuance of admonitions. They are not considered to be discipline and the respondent must consent to their imposition. According to information provided to the team, they are no longer used for these reasons. If a lawyer is found to have committed lesser misconduct that has caused little or no harm and is unlikely to be repeated, a private reproval may be appropriate as well as referral to the alternatives to discipline program.

Recommendation 19: The Standards for Attorney Sanctions for Professional Conduct Should Be Updated

Commentary

According to information provided to the team, the Board of Governors of the State Bar made revisions to the Standards for Attorney Sanctions for Professional Conduct, effective January 1, 2001, that eliminated out of date references to rules and statutes. State Bar Court staff is currently reviewing the Standards, with the intent of making substantive updates. The Office of the Chief Trial Counsel is involved in this process. Had such a review not already been underway, the team was going to recommend one. The team believes that necessary revisions should be made and submitted for adoption by the Supreme Court. All disciplinary counsel and disciplinary court judges should receive training as to how to use the Standards. Disciplinary counsel, especially new counsel, should be required to follow the Standards and existing precedent in formulating sanction recommendations.

As noted in Recommendation 15 above, the team believes that the term "moral turpitude" should be deleted from the rules relating to the discipline and conduct of lawyers. Additionally, consistent with Recommendation 6, the minimum sanction for default cases should be a form of suspension that requires reinstatement. The imposition of lesser sanctions in default cases is likely to result in recidivism.